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No. 91-128

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD ADLER AND GISELA ADLER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the assessment of additional income tax for petitioners' 1974, 1975 and 1977 taxable years is barred by the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported, but the decision is noted at 930 F.2d 26 (Table). The memorandum opinion of the United States Tax Court (Pet. App. 3a-16a) is reported at 57 T.C.M. (CCH) 1376.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1991. The petition for a writ of certiorari was filed on July 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed their joint 1974, 1975 and 1977 federal income tax returns on April 12, 1975, April 8, 1976, and June 14, 1978, respectively. Petitioners thereafter executed Forms 872 (Consent to Extend the Time to Assess Tax) and Forms 872-A (Special Consent to Extend the Time to Assess Tax) that extended indefinitely the limitations period for assessment of any deficiency for these tax years.[1] These extension agreements were properly countersigned by a duly authorized employee of the Internal Revenue Service (Pet. App. 5a-6a).

On May 23, 1984, petitioners' counsel sent a letter to the IRS at its offices in Fresno, California. The letter requested copies of all Forms 872 and 872-A signed by petitioners for taxable years 1974, 1975 and 1977, and stated that "I hereby revoke, cancel and nullify any waivers that have been executed by my clients or their representatives in favor of the Internal Revenue Service * * * for the above mentioned tax periods." Pet. App. 6a-7a. Petitioners' counsel thereafter sent similar letters to the IRS at its offices in San Jose, California. *Id.* at 7a.

The IRS did not respond to these letters. Neither petitioners nor their counsel, however, ever filed Form 872-T (Notice of Termination of Special Con-

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[1] Form 872-A, as executed by petitioners, provides in relevant part (Pet. App. 10a-11a):

> (1) The amount of any Federal Income Tax Due on any Return(s) made by or for the above taxpayer(s) for the period ended [*Date*] may be assessed on or before the 90th (ninetieth) day after: (A) The Internal Revenue Service[] office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time To Assess Tax, for the taxpayer(s). * * *

sent to Extend the Time to Assess Tax) with the IRS for any of the relevant years (Pet. 7; Pet. App. 8a, 11a). See note 1, *supra*.

2. On December 23, 1986, the Commissioner mailed statutory notices of deficiency to petitioners with respect to taxable years 1974 through 1979. The deficiencies resulted from disallowance of various losses claimed by petitioners for their partnership interests in tax shelters (Pet. 7; Pet. App. 8a).

Petitioners filed a timely petition for redetermination in the Tax Court. Petitioners claimed that the deductions for their losses from the partnerships were proper and that, in any event, the notices of deficiency were barred by the statute of limitations.[2] Petitioners asserted that they had revoked the agreements extending the statute of limitations before the notices of deficiency were issued (Pet. App. 9a).

On a stipulated factual record, the parties filed cross-motions for partial summary judgment on the question whether the extension agreements were still effective as of the date the notices of deficiency were issued. Even though the express language of Form 872-A specifies that taxes may be assessed at any time within 90 days after the taxpayer submits a "Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax" (see note 1, *supra*), and even though petitioners had never submitted the required Form 872-T to the IRS, petitioners nonetheless contended that the extension agreements had been validly terminated in this case by the letters they sent to the IRS prior to the issuance of the deficiency notices (Pet. App. 4a, 8a-12a).

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[2] After filing the petition, petitioners entered into a settlement with the IRS with respect to the years 1976, 1978 and 1979 (Pet. App. 4a).

The Tax Court rejected petitioners' contention and held that the notices of deficiency were timely. The court noted that Form 872-A unambiguously provides that assessments may be issued so long as a Form 872-T has not been filed, and concluded that, since petitioners admittedly had not mailed Form 872-T to the IRS, the Forms 872-A had not been terminated prior to the issuance of the notices of deficiency (Pet. App. 11a-13a, 16a). The court also rejected petitioners' alternative arguments that the extension agreements were invalid for lack of consideration (*id.* at 13a-14a) and that the Commissioner should be equitably estopped from seeking to collect additional taxes (Pet. App. 14a-15a).

3. On appeal, petitioners sought to advance a new contention. They argued for the first time that (i) the statute of limitations barred adjustment to the *partnership* returns at the time the notices of deficiency for the *individual* returns were issued and (ii) that the Commissioner was therefore precluded from adjusting petitioners' individual tax liability based upon adjustments to losses claimed by petitioners from their partnership interests. While disputing both the factual and legal bases of this new claim, the Commissioner urged the court to decline to consider it because it had not been raised in the Tax Court.

The Ninth Circuit did not address petitioners' new position on appeal. Instead, the court stated only that, "[f]or the reasons set forth by the Tax Court, we AFFIRM" (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct. Moreover, the issue presented in the petition was not properly raised by petitioners and was not addressed by the courts below. Further review by this Court is therefore not warranted.

1. By stipulation of the parties, the only issues presented for decision in the Tax Court were whether petitioners' attempted revocation of the extension agreement was effective and whether the deficiency notices subsequently issued by the Commissioner were therefore barred by the statute of limitations (Pet. App. 4a, 8a-12a). The Tax Court held that the attempted revocations of the Forms 872-A were ineffective and that the notices of deficiency were therefore issued within the statute of limitations (Pet. App. 1a, 13a, 16a). See 26 U.S.C. 6501(a), 6501 (c)(4), 6503(a)(1). The Ninth Circuit affirmed for the reasons stated in the Tax Court opinion (Pet. App. 1a-2a).

Petitioners do not seek review of the courts' holding on this issue. See Pet. 14-22. Instead, petitioners seek to have this Court decide an issue that was not raised in the Tax Court and was not addressed by the courts below: (i) whether adjustments to the returns of the partnerships in which petitioners had invested were barred by the statute of limitations and, if so, (ii) whether that barred the Commissioner from making adjustments to petitioners' individual returns with respect to losses they claim from their partnership interests.

The Court should decline petitioners' request to consider issues that petitioners failed properly to present below. "It is the general rule, of course, that a federal appellate court does not consider an issue

not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). See *Youakium* v. *Miller*, 425 U.S. 231, 234 (1976); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). Petitioners have failed to demonstrate any reason why an exception to this rule should be made in this case. Indeed, petitioners do not even acknowledge that the issue for which they seek review was not addressed by the courts below.

The issue ostensibly presented in the petition is especially inappropriate for review in this case because petitioners' argument is based on the unsupported factual assertion that the statute of limitations in Section 6501 (26 U.S.C. 6501) bars adjustment to the partnership returns. Even if Section 6501 applies to the information tax returns filed by partnerships,[3] the stipulated record does not establish

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[3] Section 6501 establishes a limitations period for certain tax assessments. A partnership is not itself, however, a taxable entity. The income of a partnership is attributed directly to, and taxed on the returns of, the partners. See B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 1.07, at 1-21 (5th ed. 1987). It is the Commissioner's position that the filing of the information return required for partnerships under Section 6031(a) of the Code (26 U.S.C. 6031(a)) does not trigger the running of the statute of limitations for assessments in Section 6501(a). Consequently, as long as the individual returns of the partners remain open, adjustment may be made to those returns without regard to the filing date of the partnership's return. The only courts of appeals that have addressed this specific issue have agreed with the Commissioner's position. *Siben* v. *Commissioner*, 930 F.2d 1034 (2d Cir. 1991); *Durovic* v. *Commissioner*, 487 F.2d 36 (7th Cir. 1973), cert. denied, 417 U.S. 919 (1974). There are decisions in similar contexts, however, that reach a different result. See *Fendell* v. *Commissioner*, 906 F.2d 362 (8th Cir. 1990) (trust return); *Kelley* v. *Commis-*

that adjustments to the returns of the partnerships in which petitioners had invested were time barred under that statute. For example, neither the date of the partnership returns nor the presence or absence of any extension pertaining to those returns is addressed in the stipulation.[4] In these circumstances, it is particularly inappropriate for this Court to depart from the general rule that it will not decide matters not raised in or addressed by the courts below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

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sioner, 877 F.2d 756 (9th Cir. 1989) (Subchapter S corporation return). Although the Commissioner disagrees with those decisions, the record of this case is not adequate for resolution of that disagreement.

[4] See Excerpts of Record (at 10-31) filed by petitioners as appellants in the court of appeals.

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